IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 3636 of 2006
With
CROSS OBJECTION No. 151 of 2006
In
FIRST APPEAL No. 3636 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NEETABEN HASMUKHBHAI KUBERBHAICHAUDHARY & 3 - Appellant(s)
Versus
SHAKRABHAI RAIMALBHAI RABARI & 1 - Defendant(s)

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Appearance :
MR.HIREN M MODI for Appellant(s) : 1 - 4.
NOTICE SERVED BY DS for Defendant(s) : 1 - 2.
MS MONALI H BHATT for Defendant(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 14/12/2006
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal under Section 173 of the Motor Vehicles Act, 1988 is directed against the judgment and award dated 12.5.2006 passed by the Motor Accident Claims Tribunal (Aux.) Surat in MAC Petition No.1219 of 2000. In the claim petition for compensation of Rs.15 lakhs, the Tribunal has awarded compensation of only Rs.1,41,151/- after holding that the accident was caused by the negligence of the ST bus driver and of the deceased motor-cycle driver in the ratio of 85:15.

2. This appeal for enhancement of the compensation is filed by the widow, minor son and parents of Hasmukhbhai Kuberbhai Chaudhary who died at the age of 35 years in a motor vehicle accident between the motor-cycle which the deceased was driving and the bus belonging to the respondent-Corporation.

The cross-objections are filed by the ST Corporation for challenging the award in so far as the responsibility of the ST bus driver has been determined by the Tribunal at 85%. It is contended that the accident was caused by the negligence of the motor-cycle driver i.e. the deceased himself.

3. On 28.10.2000, the deceased was riding his motor-cycle on the outskirts of village Bedchit in Vyara Taluka of Surat District. At about 7 o'clock in the evening, the bus belonging to the ST Corporation and being driven by original opponent No.2 and the motor-cycle were involved in the accident resulting into serious injuries including head injuries to the deceased who was rushed to the Vyara hospital for emergency treatment and thereafter to Surat General Hospital where the deceased succumbed to the injuries during the course of treatment. The widow, a minor son and parents of the deceased filed the claim petition for compensation of Rs.15 lakhs.

4. The claim petition was filed alleging negligence of the bus driver. The claim petition was contested by the ST Corporation, but the ST driver did not appear in the proceedings nor was the ST bus driver examined as a witness on behalf of the opponents. There was no dispute about involvement of the bus in the accident in question. On the contrary, the First Information Report itself was lodged by the ST bus driver. The main defence of the Corporation was that the deceased was driving the motor-cycle on the wrong side and lost balance with the result that the motor-cycle dashed into the right hand back portion of the bus and, therefore, the bus driver was not at all negligent.

5. In absence of any oral evidence from either side, the Tribunal appreciated the documentary

evidence – the First Information Report at Exh.28, the panchnama of the scene of the accident at Exh.29, the inquest panchnama at Exh.30 and the post-mortem report at Exh.31. The Tribunal came to the conclusion that the accident was caused by negligence of both the bus driver and the deceased in the ratio of 85:15.

6. The claimants had claimed compensation of Rs.15 lakhs on the ground that the deceased had obtained the Degree of Bachelor of Rural Studies after Higher Secondary Education and after serving in the Agriculture Department of the various authorities, the deceased was employed as Agricultural Supervisor in the Maroli Sugar Factory for about three years prior to the date of the accident; that the monthly salary of the deceased was Rs.6,000/- and that the deceased had several years of service left, if the deceased had not lost his life in the accident in question.

7. Coming to the question of quantum of compensation, the Tribunal has recorded the finding that the deceased was an Agriculture Supervisor in Maroli Sugar Factory and was getting monthly salary of Rs.6,000/-. However, instead of taking the said income as the actual income on the date of the accident, the Tribunal has assessed the actual income of the deceased only at Rs.1,075/- per month on the ground that the basic pay of the deceased was Rs.1,075/-p.m.. The Tribunal has also not given any

reasons for not considering why the potential income of the deceased should not be taken at a higher figure. Adopting Rs.1,075/- as the actual as well as potential income of the deceased, the Tribunal deducted Rs.359/- as the one-third amount which the deceased would have spent on himself and assessed the dependency benefit at Rs.717 x 12 = Rs.8,604/- p.a. and thereafter adopting the multiplier of 15 years, the Tribunal has computed the compensation for the loss of dependency benefit at Rs.1,29,060/-. Adding Rs.25,000/- under the head of pain, shock and suffering to the claimant, Rs.10,000/- for medicines and Rs.2,000/- for funeral expenses, the Tribunal has assessed total amount of Rs.1,66,060/-. Deducting 15% amount for the contributory negligence of the deceased, the Tribunal has awarded total compensation of Rs.1,41,151/- with proportionate costs and interest at the rate of 7.5% per annum.

8. In view of the absolutely unreasonable approach of the Tribunal in not taking into consideration the Dearness Allowance being received by the deceased prior to the accident which was the major chunk of his salary, we were constrained to pass a detailed order on 25.9.2006 issuing notice for early final disposal.

9. In response to the notice, Ms Monali Bhatt appears for the ST Corporation and presses the cross-objections challenging the finding of the

Tribunal that the bus driver was negligent to the extent of 85%.

10. Having heard the learned counsel for the ST Corporation and Mr Hiren Modi for the original claimants, we find that there is some substance in the grievance being made on behalf of the ST Corporation. It is true that the ST bus driver did not step in the witness box nor was he examined as a witness on behalf of the Corporation and, therefore, some adverse inference could be drawn against the ST bus driver. It is also true that the bus is a bigger vehicle as compared to the motor-cycle and, therefore, in a case where no evidence would be forthcoming, the Court would generally contribute greater responsibility to the driver of a bigger vehicle, if not the entire responsibility. However, in absence of any oral evidence of either of the pillion riders, having regard to the fact that the deceased was driving the motor-cycle with two pillion riders and the fact that the motor-cycle dashed against the right side back wing of the ST bus are circumstances which would warrant and justify attributing greater degree of negligence than mere 15% attributed by the Tribunal to the deceased. In the facts and circumstances of the case and the documentary evidence referred to by the Tribunal and having heard the learned counsel for the parties, we are of the view that the degree of negligence attributable to the bus driver and the deceased

motor-cyclist would be in the ratio of 60:40. To this extent, the cross objections would have to be allowed.

11. We are, however, shocked to notice the approach of the Tribunal regarding assessment of actual income of the deceased. In the first place, for the month of October 2000, the pay slip of the deceased indicated that his total salary was Rs.5,760/- including basic pay Rs.1,075/-, dearness allowance of Rs.2882.45 and HRA of Rs.60 and other allowances of Rs.1134. The only deductions were Rs.475 towards provident fund and Rs.20 towards professional tax. Even after all deductions, the deceased was getting take home salary of Rs.5,265/- per month. Still the Tribunal has chosen to assess the income of the deceased at only Rs.1,075/-.

12. The Tribunal has been oblivious of the fact that these days employees, particularly in the industrial sector, get basic pay which would be a smaller amount and that it is the dearness allowance which forms a substantial component of the salary income. Dearness allowance is as much a part of the salary income as basic pay is and we fail to appreciate as to on what basis the Tribunal has preferred to exclude the dearness allowance altogether while assessing the actual income of the deceased.

Dearness Allowance is the additional variable payment made by an employer to his employees over and above the basic pay, to compensate them to a certain extent, for the rise in the cost of living. Dearness allowance is directly related to the erosion of real wages by the constant upward spiralling of the prices of basic necessities and as a sequel to the inflationary impact, the fall in purchasing power of the rupee.

13 Even if the Tribunal had any doubt on the issue, reference could and ought to have been made to the provisions of Payment of Wages Act, 1936 and the Industrial Disputes Act, 1947.

13.1 Section 2 (vi) of the Payment of Wages Act, 1936 defines “wages” as under :-

> “wages” means all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, ...

13.2 Section 2(rr) of the I.D. Act defines “wages” as meaning “all remuneration capable of being expressed in terms of money, which would, if the

terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment and includes (i) such allowance (including dearness allowance) as the workman is for the time being entitled to. ... .”

13.3 Thus, Dearness Allowance has been included in the definition of “salary” or “wages” in all the relevant legislations. In view of this basic and elementary principle recognized by the Legislature also, when compensation is to be given the dearness allowance has to be considered as part of the salary.

14. The net salary of the deceased was Rs.5265/- which was the take home salary of the deceased which included the dearness allowance of Rs.2882.45 plus other allowances of Rs.1134/- and house rent allowance of Rs.60/-. Rs.475/- was the deduction from the salary towards provident fund account of the deceased and was being saved by the deceased for the benefit of himself and his family and, therefore, the net salary of the deceased was Rs.5760/- less Rs.20/- by way of professional tax i.e. Rs.5740/-.

15. The Tribunal has also not considered the well settled principle that in motor accident compensation cases, the Tribunal is required to award just and proper compensation not merely on the basis

of the actual income of the deceased on the date of the accident, but where a case is made out, also on the basis of the potential future income which the deceased would have earned over a period of time till his retirement, had he had not died in the accident in question. The undisputed facts on record are that the deceased had passed the Higher Secondary Certificate Examination (HSC) and had also done the course in Bachelor of Rural Studies. The deceased had also rendered services in the Agriculture Department. For three years, prior to the date of accident, the deceased had joined as Agriculture Supervisor in Maroli Sugar Factory and was getting monthly salary of Rs.5,760/-. The deceased was 35 years on the date of the accident. The qualification of the deceased, his varied experience, his position in the sugar factory and his age would persuade any reasonable person to take a view that the deceased had another 25 years of service and that his income would have easily gone upto Rs.12,000/- or so by the time of his retirement. However, since the Courts and Tribunals do not take such income at the time of retirement for the purpose of assessment of dependency benefit, the rule of thumb evolved by the Courts is to add 50% increase to the actual income on the date of the accident for the purpose of assessing the potential future income.

Considering the above factors, the deceased had the potential to earn higher income in future. We

would, therefore, be justified in assessing the potential future income of the deceased at Rs.8610/- by adopting the usual formula for such assessment. At the current rates of income-tax, no tax would be deductible. Deducting one-third amount from Rs.8610/- as the personal expenses of the deceased, the net dependency benefit would be Rs.5740/- = Rs.68,880/- per annum. Looking to the age of the deceased (35 years), it would be reasonable to adopt the multiplier of 13 years. Hence, the compensation for loss of dependency benefit would be Rs.68,880 X 13 = Rs.8,95,440/- rounded off to Rs.8,95,000/-.

16. The Tribunal has also erred in not considering that in fatal accident cases what is awarded as conventional amount is not on account of pain, shock and suffering to the dependents or heirs who were not present at the time of the accident, but as compensation for loss of expectation of life which goes to the estate of the deceased and, therefore, compendiously known as the conventional amount for loss to the estate. In such a fatal case, the widow of the deceased is also being awarded conventional amount for loss of consortium which head is also not considered by the Tribunal.

As regards compensation for pain, shock and suffering, the amount is to be given only where the deceased had undergone pain, shock and suffering for a number of days on account of the injuries received

in the accident which ultimately proved fatal. This amount of compensation would also go to the estate of the deceased and is to be awarded to the legal heirs. However, in the instant case, the death was instantaneous. Hence no compensation would be payable under this head.

17. As per our recent decision dated 30.11.2006 in First Appeal No. 1069 of 2006 we also award Rs.25,000/- as conventional amount for loss to the estate, Rs.15,000/- as conventional amount for loss of consortium to the widow, Rs.5,000/- as funeral expenses. We also award another Rs.5,000/- for the medical expenses which the family members of the deceased had to incur at the Vyara Hospital and the Surat Hospital.

18. The amount of compensation payable under various heads would, therefore, be as under :-

Rs.8,95,000/-	For loss of dependency benefit
Rs. 25,000/-	Conventional amount for loss to the estate
Rs. 15,000/-	Conventional amount for loss of consortium
Rs. 5,000/-	Funeral expenses
Rs. 5,000/-	For medical treatment

Rs.8,95,000/- For loss of dependency benefit

Rs.9,45,000 Total

Since we have already held that contributory negligence of the deceased was 40%, deducting 40% amount from the above figure, the net amount of compensation payable to the claimants works out to Rs.5,67,000/-.

O R D E R

19. In view of the above discussion, the appeal is partly allowed in the following terms :-

19.1 The award made by the Tribunal is modified by enhancing the amount of compensation from Rs.1,41,151/- to Rs.5,67,000/- with proportionate interest from the date of the claim petition till the date of deposit. Since in the award against the Gujarat State Road Transport Corporation, the Tribunal has already awarded interest at the rate of 7.5% per annum from the date of the claim petition (21.11.2000) till realization, in the facts and circumstances of the case, the additional amount will also carry interest at the same rate.

19.2 The additional amount of compensation with proportionate interest will be deposited by the

Gujarat State Road Transport Corporation within two months from the date of receipt of a certified copy of the judgment.

19.3 Upon deposit of the additional amount, the Tribunal shall apportion the additional amount in the ratio of 50:20:15:15 in favour of the widow, minor son, father and mother of the deceased respectively. Thereafter, the Tribunal shall invest in fixed deposits the entire amount payable to the minor son, 90% amount payable to the widow, and 60% amounts payable to the parents of the deceased. The investments shall be made in more than one fixed deposits with a nationalized bank near the residence of the claimants for a period of five years, with the usual conditions about prohibition against premature encashment of/ encumbrance over the deposits, with permission to the claimants to withdraw the interest periodically accruing on such fixed deposits and with a direction to the Bank that the bank accounts of the claimants shall not be permitted to be operated by any power of attorney holder who is not a close relative of the claimants.

The balance amounts shall be disbursed to the widow and parents of the deceased by account payee cheques after proper verification and after informing them about the amounts being invested/disbursed and the terms and conditions of investment.

20. The appeal and cross-objections are accordingly disposed of in the above terms.

21. A copy of this judgment shall be circulated to the Presiding Officer of the Tribunal who rendered the judgment challenged in this appeal and also to the learned Administrative Judge of this Court in charge of the Claims Tribunals.

Direct service is permitted.

(M.S. SHAH, J.)

(AKIL KURESHI, J.)

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